No. 89-1690

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1990

PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

CHARLES STEVEN ACEVEDO,

Respondent.

REPLY BRIEF

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I

THERE WAS ABUNDANT PROBABLE CAUSE TO BELIEVE THAT THE PAPER BAG IN MR. ACEVEDO'S POSSESSION CONTAINED ILLEGAL DRUGS

Respondent claims that the police officers lacked probable cause to believe that the bag he obtained inside the apartment and carried outside contained illegal drugs. (Respondent's Brief, Section I.) The contention can only be made by failing to consider the totality of the information known to the officers.

Relying on Rule 24.1(a) of the Rules of the Supreme Court, respondent seeks to have this Court evaluate the determination of the California Court of Appeal that under the totality of the circumstances the officer had probable cause to believe that the bag he carried from the apartment contained contraband. While this Court has the power to reach such an issue

(United States v. New York Telephone Co., 434 U.S. 159, 166 fn. 8 (1977)), the Court should exercise its discretion and not reach the question. The Court has made it plain that it will "decline to entertain" questions presented by a respondent "in the absence of . . . an indication that the issues are of sufficient general importance to justify the grant of certiorari" or where there is no "strong suggestion of an abuse" of trial court discretion. (United States v. Nobles, 422 U.S. 225, 241-242, fn. 16 (1975).) The issue presented by respondent, the determination of whether probable cause existed under a particular set of facts, is hardly of sufficient general importance to justify an independent grant of certiorari. Additionally, the record does not provide any strong suggestion of an abuse of discretion by either the trial court or the California Court of Appeal.

This Court has also recognized that another basis for a deciding not to entertain a new issue raised by a respondent occurs when the issue was not presented below. (Heckler v. Campbell, 461 U.S. 458, 468-469, fn. 12 (1983).) In this respect it should be noted that respondent never raised his belatedly resurrected issue in a petition for review to the California Supreme Court (although Rule 28(e)(5) of the California Rules of Court allows for the filing of such a cross petition) and did not raise it in a cross petition to this Court. On this ground as well the Court should exercise its discretion and decide not to hear this issue.

But assuming arguendo that the Court decides to consider the issue on the merits, petitioner submits that considering the totality of the circumstances, the California Court of

Appeal correctly concluded that there was abundant probable cause for the officers to believe that the bag Mr. Acevedo carried from the apartment contained illegal drugs.

In this case the officers knew as an absolute certainty that nine bags of marijuana had been taken into the apartment. (JA 4, 13-14.) When Mr. Daza exited the apartment and threw away the inner and outer wrapping materials, the officers knew for a fact that Mr. Daza had unpacked the illegal drugs. (JA 6.) Twenty five minutes later when the officers saw co-defendant Mr. St. George leaving, carrying something in his back pack, the officers could reasonably believe that he was leaving with part of the illegal drugs. When the officers stopped and searched his knapsack and found part of the load of marijuana (JA 6-7), it was clear that the marijuana in the

apartment was being subdivided and was being distributed. Moreover, since Mr. St. George did not have all of the illegal substance, the officers knew as a certainty that there was still more marijuana in the apartment.

Minutes later when Mr. Acevedo arrived empty handed, stayed only briefly and then left with a filled bag, it was reasonable for the officers, viewing the totality of the circumstances, to believe Mr. Acevedo, like co-defendant Mr. St. George, was also leaving with more of the illegal contraband.

In Carroll v. United States, 267 U.S. 132, 162 (1925), this Court held that probable cause to search a location exists when the facts and circumstances within the knowledge of the officers and of which they had reasonably trustworthy information were sufficient to warrant a man of reasonable caution in the belief

that the location contained illegal contraband. This Court has emphasized that in testing probable cause a "totality of the circumstances" test should be applied to the "practical, nontechnical conception" of probable cause. (Illinois v. Gates, 462 U.S. 213, 230-232 (1983).) Probable cause is "a fluid concept--turning on the assessment of probabilities in particular factual contexts--not readily, or even usefully, reduced to a neat set of legal rules." (Id., at 232.)

In the case at bar, respondent totally ignores these principles and simply isolates his actions with the paper bag without regard for the full factual context in which they occurred. The argument ignores the police officers' knowledge of the recent arrival of the bags of illegal drugs in the apartment and the activities of co-defendant

Mr. St. George minutes earlier. When the entire factual context is considered, it is abundantly clear that both of the lower courts properly concluded that the police officers had probable cause to believe Mr. Acevedo had illegal drugs in the paper bag.

In the course of his argument, respondent tries to create two red herring issues. The long discussion as to whether or not the full paper bag was of the same shape as the bricks of marijuana taken into the apartment is beside the point.[1] The fact remains that Mr. Acevedo exited with a full paper bag that likely contained part of the drugs that were known to be in the apartment. The fact

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1. Such a factual finding by the California Court of Appeal appears to have been based upon its examination of the bag seized from Mr. Acevedo and introduced at his preliminary hearing. However, the specific source of its conclusion is not made clear in the record.

that Mr. St. George was found leaving with part of the drugs indicates the drug dealers were breaking the load apart and distributing it. Whether Mr. Acevedo's bag was the same shape as the bags of marijuana is not crucial. The central point is that the totality of the circumstances supported a reasonable belief that the bag contained part of the illegal cache of drugs. Given his conduct, the conduct of Mr. St. George and the other information possessed by the officers, there was abundant probable cause to believe that the bag contained more of the illegal drugs that were in the process of being broken up and distributed.

Respondent's discussion of whether or nor Daza returned to the apartment after throwing out the inner and outer wrapping paper (see JA 5) is simply irrelevant. The central point is that Mr. Acevedo

entered the apartment empty handed and exited minutes later with a full bag, under circumstances where there was probable cause to believe the bag contained more of the illegal contraband.[2/] Mr. Daza's presence or absence does not add or detract in any way from the probable cause matrix.

Therefore, since the issue presented by respondent was not raised in a cross petition for certiorari and since it does not present an issue of sufficient general importance to justify an independent grant of certiorari, this Court should decline to reach the question. But assuming arguendo this Court decides to consider the issue on its merits, a full and fair

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2. The hypothetical posed by respondent (see last paragraph of Section I, in Respondent's brief) is inappropriate to the case at bar because it involves the carrying of a thin flat envelope that could not have contained contraband known to be in the house. (United States v. Johns, 469 U.S. 484, 487 (1985).)

reading of the record shows an abundance of facts giving the police officers probable cause to believe that Mr. Acevedo's full bag contained part of the marijuana from the apartment. Respondent's argument to the contrary can only be made by ignoring the totality of the circumstances in this case. (Illinois v. Gates, supra, 462 U.S. at 230-232.)

II

IF THERE IS PROBABLE CAUSE TO BELIEVE THERE IS CONTRABAND IN A PARTICULAR CONTAINER WITHIN A VEHICLE, THEN A SEARCH WITHOUT A WARRANT IS PROPER

In the opening brief on the merits petitioner argued that the Court's cases established that two related policy considerations are involved in every vehicle search: the inherent mobility of a vehicle, and a lesser expectation of privacy that surrounds that vehicle and its contents because the vehicle is subject to pervasive and continuing governmental regulation. Both of these rationales fully apply in the case at bar. When Mr. Acevedo placed the bag in the car it attained the same degree of mobility as the car and was in an area subject to a lesser expectation of privacy. As such, given probable cause to believe that the car contained a bag and that bag contained illegal drugs, the officers could seize it

and search it without a warrant. The rules promulgated by the Court in Ross[3/] should fully cover the case at bar. No distinction should be made based on whether there was preexisting probable cause as to the container before it was placed into the vehicle.

Respondent's initial premise is that since the vehicle was immobilized any exigency had ended. This Court has already rejected that position. As the Court stated, "the justification to conduct such a warrantless search does not vanish once the car has been immobilized." (Florida v. Meyers, 466 U.S. 382 (1984) (per curiam.) Relatedly, respondent then asserts that since a search warrant might have been readily obtained before the search, the search of the bag without a warrant was unjustified. Such a position

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3. United States v. Ross, 456 U.S. 798 (1982).

has been rejected by this Court. In California v. Carney, 471 U.S. 386, 404, fn. 16 (1985), an argument that a warrant was only minutes away was raised by Justice Stevens in his dissent but implicitly rejected by the majority. In United States v. Johns, supra, 469 U.S. at 478, 484, 486-487, this Court specifically rejected such a claim. In Johns a vehicle containing kilos of marijuana had been seized by DEA agents and taken to a warehouse. One of the attacks on the actions of the federal agents is that after the seizure and impound of the vehicle, the agents had ample opportunity to seek a warrant. This Court rejected such a claim, holding that a three day delay in conducting the search did not invalidate the officers' actions. (Id. at 487-488.)

Next, respondent questions the need for any bright line rule based on the

"plain and simple fact that no matter how bright a line is drawn, the police will follow it only when it is convenient for them." (Brief on the Merits, Argument II-B.) Respondent's assumption of fact cannot be accepted. This Court has stated that bright lines serve both the police and the public. (New York v. Belton, 453 U.S. 454, 459 (1981).) Police officers must know the limits of their authority before they encounter a vehicle in order to confidently and lawfully perform their sworn duties. Citizens have a right to know the limits of the officers' authority so they may know not only the scope of their protection but also what to expect and how to conform their conduct accordingly. (Id.) Workable bright line rules give practical meaning to the Constitutional guarantee of no unreasonable searches and seizures.

Respondent's argument that he had an even higher expectation of privacy in the contents of the bag because he placed it into the closed trunk rather than the passenger compartment of the vehicle is over simplified and thus misleading. As this Court has recognized, a privacy claim has two components: (1) a subjective belief on the part of the citizen; (2) which must be objectively reasonable. (Smith v. Maryland, 442 U.S. 735, 740 (1979), citing Justice Harlan's concurring opinion in Katz v. United States, 389 U.S. 347, 351, 354, 356 (1967).) Respondent's entire discussion focuses on his claims as to what his subjective privacy expectations must have been.[4/]

Unfortunately for respondent, this Court has held that such subjective

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4. Of course, since Mr. Acevedo never testified at the motion to suppress evidence, the entire argument is based upon speculation by appellate counsel.

expectations do not survive when officers have probable cause to believe there is contraband in a vehicle.

> "In the same manner, an individual's expectation of privacy in a vehicle and its contents may not survive if probable cause is given to believe that the vehicle is transporting contraband. Certainly the privacy interests in a car's trunk or glove compartment may be no less than those in a movable container." (United States v. Ross, supra, 456 U.S. at 823, accord United States v. Johns, supra, 469 U.S. at 484.)

Since the police had probable cause to believe that there was contraband in the bag in the vehicle, respondent's supposed subjective expectation of privacy did not survive.

Moreover, this Court has held that any subjective expectation of privacy respondent may have had is not objectively reasonable. "The public is fully aware that it is accorded less privacy in its automobiles." (California v. Carney,

supra, 471 U.S. at 392; accord New York v. Class, 475 U.S. 106, 113 (1986).)

Moreover, because of these pervasive governmental regulations, individuals have always been on notice that a movable vehicle may be stopped and searched on facts giving rise to probable cause that the vehicle contains contraband, without the protection afforded by a magistrate's prior evaluation of those facts. (United States v. Ross, supra, 456 U.S. at 806, fn. 8.) Thus, respondent's volitional act of placing the bag of contraband into the vehicle subjected it to a lesser expectation of privacy. Any greater subjective expectation of privacy on Mr. Acevedo's part was not objectively reasonable. Moreover, since the police had probable cause to believe that there was contraband in the bag in the vehicle, even this lesser, objectively reasonable

expectation of privacy did not survive at all.[5]

Respondent's claim that in Carroll v. United States, supra, 267 U.S. 132, the officers could tell what was inside the seats of the car just by touching the seat covers is simply not supported by any facts set forth in that opinion. Indeed, the dissent sets forth the full testimony of the arresting officer. All he stated was that when he "struck at the lazyback of the seat it was hard." (Id., at 172.) The officer went on to state that it was only after he pulled the items out of the seat that "he found out it was liquor." (Id.) Thus, there is not one scintilla of evidence to support respondent's claim

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5. In this regard, respondent is in the same position as the defendant in Ross. Whatever subjective expectations of privacy Ross had as to the bag of drugs in the trunk of his car, it did not survive once the police had probable cause to believe there were drugs in his vehicle. The same principles apply to Mr. Acevedo's expectation.

that "the mere feeling of the upholstery disclosed the contents." (Respondent's Argument II-D, next to last paragraph.)

Respondent's claim that there is no need to allow for a search without a warrant because police officers can be trained to learn all of the intricacies of search and seizure law and thereby properly evaluate any and all possible applications, is somewhat far fetched.[6/] The court has already recognized that this troubled area is so complex that a,

> "single, familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in specific circumstances they confront." (Dunaway v. New York, 442 U.S. 200, 213-214 (1979).)

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6. Petitioner is hard pressed to understand the logic of respondent's argument that seems to be that increased police officer education affects the degree to which a warrant is or is not needed under the Fourth Amendment.

Indeed, the fact that after so many years of litigation appellate counsel can still debate the search issues involved in this case would seem conclusive proof that no amount of training could ever equip any officer to be able to fully and properly evaluate all possible search issues in the seconds available to officers in the field confronting rapidly changing situations. Illustrative of this problem is the statement made by the International Association of Chiefs of Police (IACP) in its amicus curiae brief in support of the petition for filed certiorari in Oklahoma v. Castleberry, 471 U.S. 146 (1985). The IACP, the largest organization of police executives and line officers in the world, noted that it was,

> "involved in police training programs at the national level and can attest to the fact that teaching the Ross container distinction to police officers is a near impossibility." (Brief of Amicus Curiae, Page 6, in Case 83-2126.)

Much of respondent's argument centers on the premise that because he can enunciate a statement that reconciles the holdings in Chadwick, Sanders and Ross, this constitutes a workable bright line rule for police officers. The assertion misses the point. The issue is not how well an appellate attorney, given the luxury of time and research, can state a particular rule. The issue is how easily that rule can be applied by officers in the field who have to make instantaneous decisions based upon rapidly developing situations. As pointed out by petitioner in its opening brief on the merits, the current rule forces police officers to make incredibly subtle factual and legal determinations of when the probable cause came into existence and whether the probable cause is particularized or unparticularized. While such a standard may be capable of verbal capsulation in an

appellate brief, it is still not a rule capable of rational application in the field. That the major police agencies in this country would find that teaching the Ross container distinction a near impossibility, is hardly surprising.

Finally, respondent's claim that a search of a car should be governed by the same rules as for a search of a house, has also been rejected by this Court. (Carroll v. United States, supra, 267 U.S. at 153.)[7] Indeed, as the Court noted in Carroll, the first United States Congress, the very Congress that drafted the Fourth Amendment and circulated it to the states for ratification, also passed statutes

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7. Indeed, at times it is difficult to differentiate whether respondent is attacking petitioner's proposed application of the Ross holding or the Court's ruling in Ross itself. To the extent that respondent attempts the latter argument, it is improper as it was never presented to this Court in the petition for certiorari or in a cross petition.

allowing for warrantless searches of contraband goods on movable vessels based on probable cause. (Carroll v. United States, supra, 267 U.S. at 153; citing 1 Stat. 29, 43.) Thus, "practically since the beginning of the Government," there has been recognized,

> "a necessary difference between the search of a store, dwelling house or other structure in respect of which a proper official warrant readily may be obtained and a search of a ship, motor boat, wagon or automobile, for contraband goods. . . ." (Carroll v. United States, supra, 267 U.S. at 153.)

Thus, treating a vehicle containing contraband differently than a house containing contraband is a concept that dates from the very formative days of this nation.

Therefore, if there is probable cause to believe there is contraband in a vehicle, or probable cause to believe that there is contraband in a particular container within a vehicle, then a search

without a warrant is proper. The two controlling principles the Court has identified as being involved in every vehicle search were fully present for the search of Mr. Acevedo's vehicle: the mobility of the vehicle and its contents and the diminished expectation of privacy surrounding a vehicle. The mere fact that the probable cause centered only on one closed container before it went into the car does not diminish the scope and effect of either of these key variables.

The Court should hold that the principles it set forth in Ross and Carney govern the search of the car in the case at bar and no search warrant was required. Such a bright line rule will give needed guidance to police officers in the performance of their law enforcement functions and at the same time protect individual rights.

CONCLUSION

For the foregoing reasons, the judgment of the California Court of Appeal, Fourth Appellate District, Division Three, should be reversed.

DATED: December 18, 1990.

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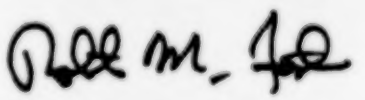

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STATE OF CALIFORNIA

Petitioner,

v.

CHARLES STEVEN ACEVEDO

Respondent.

I, THE UNDERSIGNED, say: I am a citizen of the United States, am 18 years of age or over, employed in the County of San Diego in which County the below stated mailing occurred, and not a party to the subject cause, my business address being 110 West A Street, Suite 700, San Diego, California 92101.

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Rob Dunham
ROBIN DUNHAM

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County of San Diego
My Commission Expires 11/19/93

Regina C. Kamholz
Notary Public in and for said County and State